Filed 3/22/13 In re T.C. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re T.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. T.C., Defendant and Appellant.	A129486 (Solano County Super. Ct. No. J37038)
In re T.C., on Habeas Corpus.	A131464

T.C., a ward of the court, appeals from a juvenile court dispositional order committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (now the Division of Juvenile Facilities (DJF)). The commitment order was entered after appellant was found to have violated the terms of his probation imposed on two sustained petitions for committing acts that constituted violations of Penal Code sections 243.4, subdivision (a) (sexual battery) and section 288, subdivision (b)(1) (lewd act on a child).

On direct appeal, appellant challenges both the finding that he violated probation and the DJF commitment. He also contends he was entitled to a jury trial on the underlying sexual offenses supporting his adjudication for violating Penal Code section 288 before the court imposed the mandatory "lifetime sanctions" of sex offender

registration (Pen. Code, §§ 290, 290.008, 290.016) and the attendant mandatory consequence of sex offender residency restriction (Pen. Code, § 3003.5, subd. (b)) after his release from DJF.[1] Appellant has also filed a petition for writ of habeas corpus challenging his DJF commitment.[2] We affirm the dispositional order and summarily deny the petition for writ of habeas corpus.

FACTS

A. Background

On November 14, 2006, the Solano County district attorney filed a petition under section 602 of the Welfare and Institutions Code[3] alleging that between August 29 and September 29, 2006, then 14-year-old appellant and an accomplice had committed an act that constituted sexual battery, as a felony, in violation of Penal Code section 243.4, subdivision (a). The petition was based on an incident during which appellant allegedly touched a 13-year-old female classmate's vagina outside her clothing after another student had dared appellant to touch the victim between her legs. When the victim slapped appellant and told him to get away, he touched her breasts outside her clothing. After the juvenile court reduced the allegation to sexual battery, as a misdemeanor (Pen. Code, §§ 17, subd. (b), 243.4, subd. (a)), appellant admitted the amended charge. The juvenile court declared appellant a ward of the court, returned him to his parent's custody, and placed him on probation with terms and conditions, including a prohibition against unsupervised contact with females under the age of 13. On May 15, 2007, the

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[1] Because appellant was only 14 years old when he committed acts in violation of Penal Code section 288, his juvenile adjudication would not constitute a predicate offense in any potential civil commitment proceeding under the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, § 6600, subd. (a)(1), (b), (g) [prior juvenile adjudication of a sexually violent offense may constitute a prior conviction if, among other things, "[t]he juvenile was 16 years of age or older at the time he or she committed the prior offense"].) Consequently, we do not address appellant's argument that he is entitled to a jury trial because his juvenile adjudication would qualify as a predicate offense under the SVPA.

[2] This court consolidated the direct appeal with appellant's petition for writ of habeas corpus.

[3] All further unspecified statutory references are to the Welfare and Institutions Code.

Juvenile Division of the Solano County Superior Court (probation department) filed a petition alleging that appellant had violated probation. Appellant admitted to violating probationary conditions directing him to attend school and comply with school rules. The matter was continued for disposition.

In the interim, on June 5, 2007, the Santa Clara County district attorney filed a section 602 petition alleging that appellant had committed two acts of forcible lewd and lascivious acts on a minor under the age of 14 years, constituting offenses in violation of Penal Code section 288, subdivision (b)(1). The petition was based on an April 3, 2007 incident during which then 14-year-old appellant had allegedly restrained and sexually assaulted a five-year-old female child by forcibly removing her underpants and then licking and placing his fingers in her vagina. The petition alleged that if the charges were sustained, appellant might be required to register pursuant to Penal Code section 290. On September 19, 2007, after a contested jurisdictional hearing, the juvenile court found beyond a reasonable doubt that appellant had committed the two alleged sex offenses. The matter was transferred to Solano County for disposition.

On October 18, 2007, the Solano County juvenile court held a contested dispositional hearing on both the May 2007 Solano County violation of probation petition and the June 2007 Santa Clara County petition. The court continued appellant as a ward, and committed him to the custody of the probation department for placement in a suitable foster home or institution. As part of the terms and conditions of his probation, appellant was ordered to attend mandatory sex offender counseling and to comply with treatment orders issued by the sex offender program.

For the next three years, appellant was placed in three different residential group homes. He spent 17 months in a Stockton group home, where he participated in individual, group, and family therapy sessions, and worked on sex offender treatment assignments. After he was terminated from that home, he spent six months in a Fair Oaks group home, where he participated in individual, group, and sex offender counseling. After he was terminated from the second group home, appellant was placed in a third group home, Martins' Achievement Place (Martins), a facility providing juvenile sex

offender treatment programs, considered "therapeutically strong," and one of "the most restrictive residential group home settings for sex offenders."

B. Proceedings Leading to DJF Commitment

On April 9, 2010, about one month after his placement at Martins, the probation department received a phone call from a Martins representative stating that the facility was submitting a seven-day notice of termination. Appellant's therapist reported that then 17-year-old appellant was having fantasies about raping some of the female staff members. During the night, when all of the residents were sleeping, appellant would stay awake if there was a female staff member working. The group home staff was greatly concerned about appellant's nighttime behavior. Additionally, appellant was not participating in his program and appeared to be solely motivated by sex. On April 14, 2010, the probation department filed a supplemental petition pursuant to section 777, subdivision (a)(2), alleging that appellant had violated probation by failing his placement at Martins and being terminated from that program on April 13, 2010.

1. Violation of Probation Hearing

At a June 2010 contested violation of probation hearing, the juvenile court heard testimony from several witnesses: Crystal Durrette, appellant's therapist at Martins; Michael James Galindo, the lead clinician program manager at the Stockton group home; S.E. who had known appellant since birth; and appellant's mother.

Testifying for the prosecution, appellant's therapist Crystal Durrette specified the reasons that led to the issuance of the notice of termination. Appellant had been discharged because the staff had "some concerns about his nighttime behaviors." Appellant "reported that he was sleepwalking a lot, but the female staff felt like he was trying to have time alone with them." The big concern was that appellant's conduct was only happening while the female staff was on night duty.[4] Durrette also had concerns

[4] On cross-examination, Durrette testified she was not present and did not personally witness appellant's nighttime behavior. The night staff reported that the incidents had happened almost every night since appellant had been at the facility. Durrette did not know and did not believe the staff had any reason to lie about appellant's behavior. The

based on her conversations with appellant during therapy. Appellant "just wasn't very vested" in participating in assignments or daily activities. He had done well in individual therapy sessions identifying what was holding him back in treatment, and he appeared to be forthcoming about his thoughts and fantasies. However, he had difficulty with "the problem solving portion" and "not wanting to invest in solutions as much." Durrette believed appellant should be discharged from the program based on her dealings with appellant, his overall behavior and participation in therapy, and after discussions with her supervisor.

Durrette also testified that after the issuance of the notice of termination, appellant and his family attended a meeting at Martins. At that meeting, some new plans were developed regarding appellant's counseling and treatment. The staff was considering placing appellant in housing with nighttime supervision by male staff only. After the family session, appellant seemed more motivated and the staff talked about giving him another chance to see if he was willing to engage in the treatment program.

In response to the court's questions, Durrette testified that there were six boys in each home. They were given an orientation and told the rules of the house, which included staying in their rooms at night. Appellant's reported nighttime behavior represented a safety issue to himself, the staff, and the other juveniles, because there was only one staff member on shift at night.

At the conclusion of Durrette's testimony, appellant made a motion to strike the witness's testimony on the ground that the Martins nighttime staff members had not been called to testify as witnesses. The prosecutor opposed the motion on the ground that the termination from placement was not based solely on appellant's nighttime behavior, but also on appellant's therapy conversations with Durrette. The court rejected appellant's argument that the court was required to hear from everyone as to his problems in the group home. The court explained that at issue was appellant's termination from Martins, and that Durrette, as the program representative, could testify that the termination was

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incident reports describing appellant's behavior possibly might be consistent with sleepwalking, but it did not appear so.

based on her opinion, her own observations, and the information she had received from the Martins staff. The witness was not proffering an expert opinion that appellant had violated probation. She was only testifying as to her knowledge of "her interactions, her review of staff, her discussions with staff and statements" made by appellant to her, and she was available for cross-examination. The court additionally rejected appellant's argument that Durrette's information was not reliable or credible. The court found that Durrette, "who is involved and knows staff and is intimately involved in weekly training sessions with them and knows what they are trained with on a weekly basis [does not] need to know whether they have an undergraduate degree to determine whether or not [they are] reliable and credible. That extends the right to cross-examination beyond that which the Welfare and Institutions Code contemplates." Based on Durrette's testimony, the court found the prosecution had presented a prima facie case that appellant had violated probation.

Appellant's witnesses testified regarding his history of sleepwalking. Michael James Galindo testified that during appellant's stay at the Stockton group home there were two reported incidents of perceived sleepwalking that occurred on the night of August 15 and in the early morning of August 16, 2008; "[s]taff seemed to think he was sleepwalking." When asked about the incidents, appellant did not have any memory of them. S.E. testified that she knew appellant from his birth and had lived with him on different occasions, when appellant was one, four, 10, and since he was 14. S.E. recalled appellant's sleepwalking started "when he had first lived with us when he was about two and a half, in that time frame." She saw the sleepwalking behavior "later on when he lived with [her] again at age ten." Appellant's mother testified that during the time that appellant lived with her (his birth through age 14), appellant, at all ages, would occasionally sleepwalk. When questioned about the incidents, appellant did not have any recollection of them.

After argument by counsel, the juvenile court found appellant had violated probation. The court explained: "There is no question that the minor was placed. He is under an order to participate in the program. He is to remain in that placement and obey

all reasonable directives of the placement staff and the probation department and he is not to leave that program without the permission of the court or the probation department. [¶] . . . [¶] Ms. Durrette testified to the minor's progress or lack thereof in the program and indicated that there were the concerns that were raised in the minor's therapeutic context, again, the specifics of that were not fleshed out further by virtue of [the minor's] objection,[5] but nonetheless there w[ere] the concerns regarding that coupled with minor's behavior in the context of female staff. [¶] . . . [A]s to that she stated quite clearly in her testimony . . . and my notes reflect the collective decision of the supervising staff to discharge the minor. [¶] Probation was then [notified] of the intention to discharge the minor and probation then went to the group home and placed the minor under arrest and removed him from the program based on that notice from Martin's Achievement that it was their intention to discharge the minor from the program. [¶] It's also apparent to the court that Martin's Achievement continued to work with the minor and was nevertheless apparently willing to work with the minor based on cooperation of the minor's family who came and met with them and a revision in the treatment plan. [¶] But . . . there is no dispute that the minor received a seven-day notice and when the probation department got that seven-day notice they acted and placed him under arrest. [¶] And was that premature or not? The question is not really one for the court to second guess. The minor was in the program, received a notice of discharge and probation placed him under arrest based on that. [¶] The evidence to discharge the minor was based, again, on the concerns expressed by [Ms. Durrette] who testified, [about] the minor's progress in the program or lack thereof. . . . [¶] Frankly, under the standard of preponderance of the evidence, the People have met their burden. . . . [T]his has really

[5] The juvenile court sustained appellant's objection to Durrette's testimony regarding appellant's specific statements to her during individual therapy sessions. The court found the communications were privileged, and although appellant was a minor, he was of sufficient age and capacity to exercise that privilege and notwithstanding his mother's waiver of that privilege. The court struck any testimony already given and prohibited further testimony as to the specifics of appellant's conversations with Durrette during individual therapy sessions. Therefore, and as requested by appellant, we have not considered any stricken testimony in reviewing the juvenile court's finding.

now become a dispositional issue because there is clearly a balance that the court has to achieve between [the minor's] appropriateness for continued supervision in the community or not. [¶] But, under the preponderance of the evidence standard, has the prosecution met its burden? I do believe they have. [¶] . . . [W]hat's before the court today was established by the testimony of Ms. Durrette, notwithstanding the testimony of the other witnesses who made efforts to explain in part the minor's . . . 'sleep walking behavior.' [¶] But Martin's [A]chievement home has an obligation to keep the minor and its residents sa[f]e and that behavior was contrary to the rules and in the eyes of that program placed both the minor and [its] other residents at risk and that is a factor that the court has to consider notwithstanding."

2. Depositional Hearing

Before the dispositional hearing, senior deputy probation officer Nilsa Carter filed a report recommending that appellant be committed to DJF. She provided, in pertinent part, the following assessment: "[Appellant] has failed three residential juvenile sex offender treatment programs. At his first placement, where he spent seventeen months in juvenile sex offender treatment, [appellant] made minimal progress due to his willingness to discuss his offense and family history, as well as disclose prior victims and sexual fantasies. However, he displayed several concerning behavior issues and he was ultimately terminated after it was discovered he had been viewing pornography via the internet for three months while given the opportunity to complete school work. While at his second placement, [appellant] was terminated due to breaking into the staff office to view pornography on a computer, threatening to rape a female staff [member] as a form of retaliation, and his over-all lack of commitment to change his deviant sexual behaviors. Finally, while at his third, most recent placement, [appellant] was terminated for disclosing fantasies about raping their staff member[s] causing great concern to the group home because [appellant] would stay awake throughout the night while the female staff was working. Additionally, . . . [appellant] was not participating in his over-all program, and he appeared to be solely motivated by sex. [¶] According to Dr. [Kimberely] Smith's evaluation dated 12/9/09, '[appellant] has a poor understanding of

his risk factors or risk management strategies. He can[not] adequately identify triggers, thinking errors, high risk situations, or offense justifying attitudes despite two years of residential treatment. There is some degree of internal conflict and distress regarding the offenses but it appears to be a result of a clear desire to avoid the consequences of reoffending.' [¶] Dr. Smith's assessment continues to be an accurate assessment, as evidenced by [appellant's] comments during the dispositional interview regarding his current violation of probation. [Appellant] did not dispute failing to participate fully in the program. However, he minimized his placement failure by stating he was 'terminated due to sleepwalking.' [Appellant] continues to either be unwilling to accept responsibility for his lack of motivation to make positive changes or he lacks the ability of insight regarding why he continued to fail residential juvenile sex offender (JSO) treatment, despite being offered intensive JSO treatment for the past two and a half years. Additionally, [appellant] expressed concern with not being able to 'get' the treatment while in [DJF], but feeling he would appear to have 'gotten it' because he would behave due to his fear of being physically restrained by [DJF] staff." Carter also reported that "[t]he Juvenile Sexual Offense Recidivism Risk Assessment Tool- II (JSORRAT-II) was completed on 6/14/10. According to the state mandated instrument, [appellant was] assessed as a Moderate-High Risk of sexual recidivism," "which [was] the highest outcome score."

In her report, Carter discussed DJF's programs and treatments that would be available to appellant as explained by a DJF intake and court liaison. If committed to DJF, appellant would be initially considered for parole in four years and retained until he was 25 years of age, which would give him enough time to complete DJF's programs and allow for parole supervision services. "Due to [appellant's] history of mental health needs, [the DJF officer] stated a Diagnostic Evaluation will be completed to determine whether [appellant] would be housed in their Sex Behavior Treatment Program or in the Mental Health Program. If [appellant's] mental health needs are evaluated as needing a higher level of care, he may be placed into the residential Mental Health Program while currently receiving the Sex Behavior Treatment Program." DJF would also provide

appellant with educational services to assist him in completing his high school requirements, and additional continuing education, training opportunities, and college courses. Carter concluded that after a lengthy and in-depth review of all available options for appellant, DJF commitment was deemed the most viable option, as it would provide the most comprehensive treatment plan and community safety.

At the July 2010, contested dispositional hearing, the prosecutor submitted on the probation department's recommendation of commitment to DJF. Appellant testified on his own behalf and called several witnesses: Lynn Carr, the assistant executive director and educational director at Martins; Crystal Durrette, a licensed clinical social worker and appellant's therapist at Martins; his mother; and probation officer Nilsa Carter.

Lynn Carr testified that even though appellant would be 18 two days after the hearing, she believed he was suitable and it would be reasonable to return him to Martins. There was a place immediately available in a house with older boys and none younger than 17 years old. The staff was predominately male with only one female staff member whose partner was a male staff member. There were four additional roving staff members who had been added in the last two months. However, Carr confirmed that appellant would only be able to stay at Martins for one year, until the day before his 19th birthday and then he would have to be discharged. Carr was aware that appellant had been participating in sex offender treatment for about three years and that in Durrette's opinion appellant had made very little progress in treatment. Carr also would say that appellant had made either minimal or no progress while in treatment in two previous group homes. In order for appellant to make enough progress to be discharged in a year, he would have to attend at least two individual therapy sessions per week and a determination would have to be made if he needed to be in more groups. Carr believed it was possible that appellant would reach a point in a year where he could be released into the community. However, it would be appellant's investment and commitment that would determine whether he succeeded at the program.

Crystal Durrette testified that after the issuance of the notice of termination, she had a meeting with appellant's family members and appellant. They discussed how to keep appellant safe in the program for as long as he was at the facility. After the family discussion, Durrette met with Lynn Carr, and Stacey Small, the program's director, and it was decided "to give [appellant] another chance and see if he would be willing to do the program." At the time of appellant's actual removal from the facility, Durrette believed appellant could possibly benefit from staying at Martins if he were motivated to participate in treatment. Appellant would have to participate in "a lot of therapy . . . individual and group," and "a lot more group therapy in a shorter amount of time, so he would have to be really committed to doing all the work." In her discharge report, Durrette "recommended that [appellant] . . . be placed in a secure treatment facility with a high level of supervision which offers juvenile sex offender treatment and treatment for mental health issues, and that it may also be important to limit his contact with female staff." Durrette believed Martins could fulfill those requirements but "it's all going to come down to [appellant's] motivation for treatment." In terms of security and public safety, appellant would be monitored 24 hours a day at Martins. Durrette believed it was possible that in a year appellant might be in a place where he could be safely returned to the community to participate in outpatient sex offender counseling and treatment. However, it was very difficult to predict that outcome.

Durrette confirmed that during the time she spent with appellant, she was experiencing some of the same issues that were noted in the reports from his other group homes. Appellant was minimally, if at all, participating in his treatment. Additionally, there were incidents at Martins where appellant did act out physically, hitting walls and slamming things. There was nothing in appellant's past behavior that made Durrette confident that appellant would participate more in treatment if allowed to return to Martins. If appellant was not motivated, then a different treatment plan would not work as he would continue to have the same thought processes and the same patterns, and he would not be safe to release. Because he would have a shortened time to make positive

changes, appellant would "really have to be motivated" throughout the treatment program at Martins.

Nilsa Carter testified that in reaching her recommendation, she relied on Dr. Smith's psychological evaluation of appellant and information regarding appellant's termination from Martins. Carter also interviewed appellant at juvenile hall regarding the recommendation to place him at DJF. Appellant did not believe he could get competent sex offender counseling at DJF because he would not understand or get concepts that they were trying to teach him. He was also fearful of being restrained by DJF staff. At the end of the interview, appellant said, "This may sound stupid, but I am ready now." Carter conceded that appellant could have meant he had not applied himself to counseling and treatment in the past and he was now ready to make that sincere effort.

Before making her recommendation Carter contacted a DJF representative who sent her a two-page document generated by DJF. The document listed DJF's staff (psychologists and senior client counselors, case managers, and case specialists) and explained the type of treatment appellant would receive at DJF.[6] Carter was aware of ongoing litigation concerning DJF and specifically the sex behavior treatment program based on a letter she had received from appellant's counsel. However, she did not receive any documents regarding that litigation that had been sent by appellant's counsel two days before the dispositional hearing. Thus, Carter was not aware at the time she made her recommendation that the most recent special master report regarding the DJF program had found that DJF psychologists continued to fail to provide the requisite number of one-on-one treatment hours with minors in this program. She also was not aware that an independent special master had found that the sex behavior treatment program staff did not follow a standardized treatment program approach which had led to

[6] With the approval of appellant's counsel, the court admitted into evidence the two-page document generated by DJF "revised 6-1-2010." The document indicated: "This information is accurate as of the date printed. A new update will be published in August 2010, at which time this update will expire."

a type of inconsistency that had been a problem for the program in the past. Carter also did not have information about violent altercations at DJF.

After hearing the new plan proposed for appellant at Martins, Carter would not change her recommendation. She did not believe anything would motivate appellant. She was appellant's assigned probation department officer for most of time that he was in treatment in the prior group homes and she did not see any type of progress. She actually saw him getting worse. Carter based her opinions on her conversations with group home staff and appellant's actual treatment providers. Carter met with appellant's social work clinicians at each group home every month.

Appellant's mother testified that since he had been removed from Martins and placed in Juvenile Hall he had "turned a corner." He said that he wanted to benefit from the treatment programs so that he could go home. She believed that appellant's shift in attitude might contribute to a different result if he was given another chance. She did not believe that appellant was mature enough to deal with being housed with adult men because he was not capable of defending himself and he would suffer physically and emotionally. She felt appellant would be more motivated if allowed to return to Martins because "the group home sort of admitted making a tiny mistake in having him removed." She admittedly told the probation department representative that the Martins staff was not " all that mature" in their choices and they really could not answer her questions. However, if the Martin staff had made changes, then "maybe it will work," and "everyone will benefit from it."

During his testimony, appellant admitted he had not put forth an acceptable level of effort in his sex offender counseling treatment program while at Martins. However, since his removal from that program and his detention in juvenile hall for three months, appellant now understood that he needed help and if he did not get help he was going to be a danger to himself and other people. Appellant also admitted that three days before the dispositional hearing he had gotten into trouble at juvenile hall. Until that time, he had been following the rules at juvenile hall to the best of his ability and had reached "step three," with the highest step being four. The school incident was a "setback," and

he returned to "step one." The school incident concerned appellant talking in class and reacting inappropriately when he was corrected by his teacher. Appellant was sent out of the class. As he walked out, appellant said, "I don't care anymore. I'm leaving in three days." Appellant now recognized his teacher was acting appropriately and he acknowledged regret and wrongdoing.

Appellant admitted he had been saying he was prepared to change and to show it since the first dispositional hearing, but that "really nothing [had] changed" since then, and DJF was always a possibility and "a huge possibility" when he was sent to Martins. At that time, the juvenile court judge had told appellant, "This is it." And, notwithstanding the judge's statement, appellant admitted he behaved in a way that led to his discharge. He had little motivation to do anything, he was very lazy, he had all the time to do his work and he chose not to do it, he did not participate in treatment, and he did not complete his assignments. When asked what would be different if the court allowed him to return to Martins, appellant felt that this time it would be easier for him to understand and recognize that he had made mistakes.

After argument by counsel, the juvenile court committed appellant to DJF. In so ruling, the court stated it had "heard all the evidence. I have read and considered the social study report provided by the probation department. I have heard the arguments and I am prepared to rule, and I am going to follow the recommendation of the probation department. . . . [¶] I was very impressed by the testimony of Crystal Durrette. I think she was in a difficult position as far as her testimony, and I think she spoke very honestly that . . . whether he could return to the community safely in one year . . . was impossible to predict. If he was not motivated and did not work, he would not be safe to return to the community. [¶] He's had plenty of time. He's squandered it, seriously squandered it, and now he's just out of time, and I am not about to take the chance with innocent people in the public suffering psychological and emotional abuse because he's failed to do what he should have done some time ago. [¶] So at this point, the court is going to make the following orders: That the minor is currently a ward and priors orders of the court have not been effective in his rehabilitation and control. He's to be continued as a ward of

[the] court and all previous orders not in conflict with the present order can remain in full force and effect. [¶] . . . The minor has been tried on probation in the custody of his parents and has failed to reform. The welfare of the minor requires that custody be taken from his parents and that the continuation of such custody would be contrary to his welfare. [¶] Reasonable efforts have been made to prevent or eliminate the need for removal of the minor from his mother, but at this point it is simply not possible for him to return home." The court found appellant's mental and physical condition and qualifications were such as to render it probable that he would benefit by the reformatory educational discipline and any other treatment provided by DJF. Appellant was committed to DJF for a maximum physical confinement period of four years. The court also ordered appellant to register as a sex offender pursuant to Penal Code section 290 on his release from DJF.

DISCUSSION

I. Juvenile Court's Finding that Appellant Violated Probation

Appellant challenges the juvenile court's finding that he violated probation on two grounds: (1) the admission of Durrette's testimony regarding appellant's nighttime behavior was an abuse of discretion and violated his right to due process because it was inadmissible hearsay and deprived him of the right to confront witnesses; and (2) there was otherwise insufficient evidence to support the finding that he violated probation. We conclude appellant's contentions are unavailing.

Appellant presents extensive arguments challenging the juvenile court's admission of Durrette's testimony regarding appellant's nighttime behavior at Martins. However, we need not address his contentions as appellant has failed to demonstrate that the admission of the challenged evidence was prejudicial error under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [constitutional law error]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error].) According to appellant, absent Durrette's hearsay testimony, there was no substantial evidence that appellant violated probation. We disagree. Durrette's testimony concerning her personal interactions with appellant during counseling sessions was substantial evidence from which the juvenile

court could conclude based on a preponderance of the evidence that appellant violated probation by failing to adequately participate in the sex offender treatment program at Martins. (See *In re Pedro M*. (2000) 81 Cal.App.4th 550, 555 (*Pedro M.*) [therapist's testimony "was sufficient . . . to sustain the juvenile court's finding that appellant had violated conditions of probation by not cooperating in his sex offender treatment plan, the object of which was to lower his risk of re-offending"], disapproved on another ground in *People v. Gonzales* (2013) __ Cal.4th __, __ [2013 Cal.Lexis 1817 at p. *49, fn. 6].) We are not persuaded by appellant's argument that *Pedro M*. is factually distinguishable from this case and should not be relied on by this court. Appellant argues he could not be found to violate probation because despite his failure to adequately participate in counseling, the Martins staff had reversed its decision to terminate him and was willing to give him a second opportunity to succeed with an alternative treatment plan. However, whether appellant had violated the terms of his probation was a decision to be made by the juvenile court and not the Martins staff. Appellant's possible return to Martins was a matter to be considered, and was considered, by the juvenile court at the dispositional hearing.[7]

II. Commitment to DJF

On direct appeal and as the sole argument in his writ petition for habeas corpus relief,[8] appellant argues the juvenile court abused its discretion by committing him to DJF. We disagree.

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[7] Because we find no reversible error regarding the juvenile court's finding of a probation violation, we reject appellant's conclusory argument that "[a]fter a review of the record herein and based on the numerous errors briefed, the true finding of the probation violation charged against appellant must be reversed."

[8] In support of his petition for writ of habeas corpus, appellant asks us to take judicial notice of the record and pleadings on appeal in this case, which request is granted. Appellant also asks us to take judicial notice of declarations and documents relating to pending litigation against DJF challenging the adequacy of DJF's sexual treatment programs and rehabilitative care at its facilities, which evidence had not been presented in the juvenile court. In a second request, appellant asks us to take judicial notice of an additional document in the pending litigation against DJF, which was issued after the juvenile court proceedings in this case had been completed. Because the documents

Although "juvenile proceedings are primarily 'rehabilitative' ([§ 202,] subd. (b)), and punishment in the form of 'retribution' is disallowed (*id*., subd. (e))," "[w]ithin these bounds, the [juvenile] court has broad discretion to chose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public. ([§ 202], subd. (e).)" (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.) We are not persuaded by appellant's citation to cases that "predate the amendment of former . . . section 502 (now § 202) regarding the purposes of the Juvenile Court Law." (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 57.) "In 1984, the Legislature amended the statement of purpose found in section 202. . . . It now recognizes punishment as a rehabilitative tool and emphasizes the protection and safety of the public. (Stats. 1984, ch. 756, §§ 1, 2.) The significance of this change in emphasis is that when we assess the record in light of the purposes of the Juvenile Court Law [citation], we evaluate the exercise of discretion with punishment and public safety and protection in mind. Such was not the case before 1984." (*In re Lorenza M*., *supra*, 212 Cal.App.3d at pp. 57-58, fn. omitted.)

Pursuant to section 734, [9] a juvenile court is authorized to commit a juvenile to DJF where it is fully satisfied that DJF "with its specialized institutions and rehabilitative programs tailored to the [juvenile's] sophistication and need for security [citation], offer[s] the promise of probable rehabilitative benefit." (*In re Tyrone O*. (1989) 209 Cal.App.3d 145, 153.) As an appellate court, we review "a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision." (*In re Angela M*. (2003) 111 Cal.App.4th 1392, 1396.) "We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the

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relating to the pending litigation against DJF are not necessary for our resolution of the issues before us, we deny these requests for judicial notice as moot.

[9] Section 734 reads: "No ward of the juvenile court shall be committed to the Youth Authority [now DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority [now DJF]."

credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

Relying on *In re Jose T.* (2010) 191 Cal.App.4th 1142, appellant argues the juvenile court's comments at the dispositional hearing in this case reflect that commitment to DJF was "automatic," without consideration of the effectiveness or appropriateness of less restrictive alternative placements. However, appellant's reliance on *Jose T.* is misplaced. In that case, the juvenile court initially noted it had no problem with the appellant finishing a treatment program that had accepted him back after he left without permission. (*Id.* at p. 1147.) However, after the court was reminded about a previously stayed commitment to DJF, the court stated that appellant was going to be committed to DJF because the court "usually [kept its] promises." (*Ibid.*) In setting aside the commitment to DJF and remanding for a new dispositional hearing, our colleagues in Division Four explained: "The juvenile court's statement at the time of imposing the previously stayed [DJF] commitment on appellant indicates a failure to conduct 'a complete reassessment of dispositional issues in light of then-prevailing circumstances,' and therefore constituted an omission to exercise 'a discretion conferred and compelled by law.' [Citation.] All reports relating to appellant's progress at [a community-based program] were positive, and the probation department recommended his return to the program. The juvenile court expressed a willingness to send appellant back to [the program] before being informed about the previously stayed [DJF] commitment. Its comment after being informed about the previously stayed commitment . . . necessarily leads us to agree with appellant that the disposition imposing that prior commitment was 'automatic' and thus, was error." (*Id.* at p. 1149, fn. omitted.)

Unlike the situation in *Jose T.*, the juvenile court here reasonably concluded that Martins would not be an appropriate or effective placement for appellant. At the time of the July 2010 dispositional hearing, appellant was two days shy of his eighteenth birthday and could only participate in Martins treatment program for one year. As opposed to a return to Martins for one year, a DJF commitment would provide appellant with long-

term, rehabilitative programs in a structured environment, as recommended by the probation department officer. Appellant argues the juvenile court should have considered that he had only been at Martins for little more than one month, his treatment plan had been revised, and the Martins staff had rescinded their decision to terminate him. However, appellant fails to discuss the testimony of the Martins staff, as well as his own testimony, confirming that while appellant was at Martins he had not adequately participated in the sex offender treatment program. The Martins staff also was quite clear that a return to Martins would only be effective and appropriate if appellant was motivated to comply with its treatment program. The juvenile court was free to reject the testimony of appellant and his mother that he would be motivated to participate in treatment if allowed to return to Martins. The court in essence found that appellant had been previously warned "where his conduct was leading. [His] failure to heed the warning indicated he had not taken his rehabilitation and warnings regarding future conduct seriously. It demonstrates there had been no change in attitude by [appellant.]" (*In re Chad S.* (1994) 30 Cal.App.4th 607, 615; see In *re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1090, fn. 8 ["a minor's failure to heed such a warning may be taken as some evidence of resistance to rehabilitation"].) By his argument, appellant asks us to reweigh the evidence, and substitute our judgment for that of the juvenile court. We decline to do so. On this record, we see no abuse of discretion in the juvenile court's refusal to allow appellant to return to Martins. "Where the minor has previously failed in a series of local programs . . . statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations." (*In re Greg F.* (2012) 55 Cal.4th 393, 418; see *In re Martin L.* (1986) 187 Cal.App.3d 534, 544 ["[c]ircumstances in a particular case may well suggest the desirability of a [DJF] commitment despite the availability of . . . alternative dispositions"].) [10]

[10] At the time of the dispositional hearing, appellant's counsel asked the juvenile court to place appellant at Martins. We recognize that appellant's placement at Martins is no longer available due to his reaching the age of twenty during the pendency of this appeal. Nevertheless, we have addressed the issue of the court's rejection of an alternative

We also reject appellant's argument that there was no substantial evidence that he would probably benefit from a DJF commitment. Although the juvenile court did not expressly comment on the matter at the dispositional hearing, the court had before it evidence regarding the programs then currently available at DJF. In its commitment order, the juvenile court indicated appellant had an individualized education program that would be furnished to DJF, and the court requested that appellant "be considered for programming related to Sex Behavior Treatment Program." Thus, we are convinced that "the juvenile court found it was probable [appellant] would benefit from being committed to [DJF], because it anticipated [appellant's] needs would be addressed by programs offered at [DJF]. There is no requirement that the court find exactly how a minor will benefit from being committed to [DJF]." (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486.) Before accepting a juvenile at DJF, it is the responsibility of the Director of the Division of Juvenile Justice to determine if a juvenile "can be materially benefited by [DJF's] reformatory and educational discipline, and if [DJF] has adequate facilities, staff, and programs to provide that care." (§ 736, subd. (a).) "To determine who is best served" by DJF and "would be better served by the State Department of Mental Health," "the Director of the Division of Juvenile Justice and the Director of the State Department of Mental Health shall . . . confer and establish policy with respect to the types of cases that should be the responsibility of each department." (§ 736, subd. (b).) Concededly, the juvenile court did not find that appellant had exceptional needs. However, the probation department officer indicated in her report to the juvenile court that due to appellant's "history of mental health needs," the DJF staff would complete a diagnostic evaluation to determine whether appellant would be housed in the DJF Sex Behavior Treatment Program or in the Mental Health program. If appellant needed a higher level of care, he might be placed in the residential Mental Health program while concurrently participating in the Sex Behavior Treatment Program. The juvenile court could—and this court does—presume that, if DJF determines that appellant has exceptional needs, such

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placement on the assumption that were we to reverse, the court could place appellant at some other facility that currently exists for minors who have reached the age of 20.

needs will be met. (Evid. Code, § 664 [presumption that official duty has been regularly performed].) We are not persuaded by appellant's argument that he is entitled to reversal or habeas relief because DJF's sex offender treatment and other rehabilitative care programs and facilities are deficient in certain respects. If appellant believes DJF is "unable to, or failing to, provide treatment consistent with [s]ection 734," he may seek relief in the juvenile court. (See § 779; [11] see also *In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1322-1323 [juvenile court may entertain motion to modify or vacate DJF commitment where there is a showing under section 734 that the ward is unlikely to benefit from DJF's education and treatment].)

III. Entitlement to Jury Trial on Underlying Sex Offenses Before Imposition of Sex Offender Registration and Residency Restriction

After appellant's adjudication for violating Penal Code section 288 and his commitment to DJF, the juvenile court was required to direct appellant to register as a sex offender pursuant to Penal Code sections 290, 290.008, and 290.016.[12] (See *In re G.C.*

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[11] Section 779 reads, in pertinent part: "The court committing a ward to the Youth Authority [now DJF] may thereafter change, modify, or set aside the order of commitment. . . . This section does not limit the authority of the court to change, modify, or set aside the order of commitment after a noticed hearing and upon a showing of good cause that the Youth Authority [now DJF] is unable to, or failing to, provide treatment consistent with Section 734."

[12] Penal Code "[s]ections 290 to 290.024, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to 'the Act' in those sections are to the Sex Offender Registration Act." (Pen. Code, § 290, subd. (a).) The Sex Offender Registration Act (the Act) requires lifetime registration for every person convicted of certain sex offenses (including violations of Penal Code section 288) while residing in California, or while attending school or working in California, as described in sections 290.002, and 290.01. (Pen. Code, § 290, subds. (a), (b), (c).) Penal Code section 290.008 provides, in pertinent part, that "[a]ny person who, on or after January 1, 1986, is discharged or paroled from the Department of Corrections and Rehabilitation to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in subdivision (c) shall register" pursuant to the Act. [¶] . . . [¶] (c) Any person described in this section who committed an offense in violation of any of the following provisions shall be required to register pursuant to the Act: [¶] . . . [¶] (2) Any offense defined in . . . Section

(2007) 157 Cal.App.4th 405, 409, 411.) As a consequence of his status as a registered sex offender and after his release from DJF, appellant must comply with the residency restriction in Penal Code section 3003.5, subdivision (b) (hereafter also referred to as Jessica's Law). [13]

Appellant argues he is entitled to a jury trial on the underlying sex offenses giving rise to his juvenile adjudication before he can be required to register as a sex offender and comply with the residency restriction in Jessica's Law. According to appellant, once his wardship ends, the challenged sanctions, whether punitive or regulatory, will no longer have any rehabilitative effect. Instead, "these sanctions become adult sanctions for the remainder of [his] life. Because they are lifetime requirements, [he] is entitled to the same procedural protections that an adult receives in a jury trial for determining factual allegations that result in these sanctions."[14] We conclude appellant's arguments are unavailing.

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288 . . . ." Since January 1, 1998, an adjudicated juvenile sex offender who has been committed to DJF has been required to "preregister" as a sex offender. (Pen. Code, § 290.016.) "The preregistering official shall be the admitting officer at the place of . . . commitment . . . . The preregistration shall consist of all of the following: [¶] (1) A preregistration statement in writing, signed by the person, giving information that shall be required by the Department of Justice. [¶] (2) The fingerprints and a current photograph of the person. [¶] (3) Any person who is preregistered pursuant to this subdivision is required to be preregistered only once. [¶] (4) Within three days thereafter, the preregistering official shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice."

[13] Penal Code section 3003.5, subdivision (b) states: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

[14] In his opening brief, appellant relies extensively on *In re J.L.* (2010) 190 Cal.App.4th 1394, and *People v. Mosley* (2010) 188 Cal.App.4th 1090. In his reply brief, appellant acknowledges that after the filing of his opening brief the Supreme Court granted review in *Mosley* on January 26, 2011, S187965, and in *J.L* on March 2, 2011, S189721. Consequently, we do not rely on or further discuss those cases. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).) Appellant argues that even if the Supreme Court reverses *Mosley* and *J.L.*, his argument "remains unchanged."

" 'There is a well-understood distinction between a juvenile wardship adjudication on the one hand, and adult criminal proceedings leading to a "felony conviction." ' [Citation]. It is settled that while certain constitutional protections enjoyed by adults accused of crimes also apply to juveniles (e.g., notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination, double jeopardy, proof beyond a reasonable doubt), '. . . the Constitution does not mandate elimination of all differences in the treatment of juveniles.' [Citation.] Thus, juveniles enjoy no state or federal due process or equal protection right to a jury trial in delinquency proceedings." (*People v. Fowler* (1999) 72 Cal.App.4th 581, 585 (*Fowler*); see *Schall v. Martin* (1984) 467 U.S. 253, 263; *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545-547, 550 [plur. opn. of Blackmun, J.], 551-552 [conc. opn. of White, J.] (*McKeiver*); *People v. Nguyen* (2009) 46 Cal.4th 1007, 1019 (*Nguyen*); *Alfred A. v. Superior Court* (1994) 6 Cal.4th 1212, 1225; *People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274; *In re Daedler* (1924) 194 Cal. 320, 332.)

We find instructive our Supreme Court's decision in *Nguyen, supra*, 46 Cal.4th 1007. In that case, the court upheld a provision of the Three Strikes law, allowing that "certain serious prior judicial adjudications should serve as 'prior felony convictions' for the purpose of enhancing sentences for subsequent adult felony offenses." (*Id.* at p. 1028.) The court specifically rejected Nguyen's argument that because he had no right to a jury trial in the prior juvenile proceeding, the Sixth and Fourteenth Amendments, as construed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, barred the use of the resulting juvenile adjudication to enhance his maximum sentence in his current adult criminal proceeding. (*Nguyen, supra*, 46 Cal.4th at pp. 1014-1015.) In rejecting Nguyen's claim, the court explained its understanding of the United States Supreme Court's decision in *McKeiver, supra*, 403 U.S. 528 as follows: "The United States Supreme Court has left no doubt of the importance of the jury trial guarantee, among other due process and fair trial protections, in the formal, fully adversary, and fully penal context in which one is convicted of, and sentenced for, a crime committed as an adult. . . . [¶] But the [*McKeiver*] court struck a delicate balance as to the constitutional treatment of juveniles

alleged to have violated the criminal law. Such a juvenile, like an adult accused, faces both the stigma of adjudged criminality and the significant loss of liberty by confinement in a correctional institution if the allegations prove true. Thus, '[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.' [Citation.] Accordingly, the highest standard of factual certainty, proof beyond a reasonable doubt, attaches equally to adult and juvenile proceedings. [Citation.] Similar considerations have led the court to insist that most other procedural protections available to accused adults—including the right to counsel (appointed if necessary), notice of charges, confrontation and cross-examination, and protection against compelled self-incrimination and double jeopardy—be equally available to juveniles subject to adjudication of criminal conduct. [Citations.] [¶] The court's decision in *McKeiver* not to find a constitutional jury trial right in juvenile proceedings reflected its concern that the introduction of juries in that context would interfere too greatly with the effort to deal with youthful offenders by procedures less formal and adversarial, and more protective and rehabilitative—at least to a degree—than those applicable to adult defendants. [Citations.] But the *McKeiver* majority made clear that the absence of a right to trial by jury did not appreciably undermine *the accuracy of the factfinding function* in juvenile cases." (*Nguyen, supra*, 46 Cal.4th at pp. 1022-1023.) "Justice Blackmun deemed it incorrect to say that 'the jury is a necessary component of accurate factfinding' (*McKeiver, supra*, 403 U.S. 528, 543 (plur. opn. of Blackmun, J.)), and further opined that '[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function . . .' [*id*. at p. 547]. Justice White agreed, noting that '[a]lthough the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge.' (*Id*. at p. 551 (conc. opn. of White, J.).)" (*Nguyen, supra*, at p. 1020.) In the intervening years, the United States Supreme Court "has not disturbed *McKeiver*'s determination that juvenile adjudications of criminality *are* constitutionally fair and reliable even though the Constitution does not require jury trials in juvenile proceedings." (*Nguyen, supra*, at p. 1024; see *Schall v. Martin, supra,* 467 U.S. at p. 263.)

The *Nguyen* court's decision, together with its discussion of *McKeiver*, requires us to conclude that a juvenile adjudication, "obtained pursuant to *all procedural guarantees constitutionally due to the offender in [that] proceeding*—specifically including the right to proof beyond a reasonable doubt"—is "sufficiently fair and reliable, without the right to a jury trial," to mandate a juvenile offender to register as a sex offender and comply with the residency restriction in Jessica's Law. (*Nguyen, supra,* 46 Cal.4th at pp. 1023, 1024.) Contrary to appellant's contention, the "collateral impact" of the sex offender registration law and the residency restriction in Jessica's Law arising from the adjudication alone "does not change the fundamentally different nature of juvenile and adult court proceedings" (*In re Myresheia W.* (1998) 61 Cal.App.4th 734, 741), and has no affect "on the adjudication process in the juvenile court" (*Fowler, supra,* 72 Cal.App.4th at p. 586). As one appellate court noted, "in light of nearly 80 [now 90] years of precedent beginning with *In re Daedler*[, *supra*,] 194 Cal. 320 . . . only the California Supreme Court can now consider the question whether the California Constitution confers a right to a jury trial in juvenile court proceedings." (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1079, fn. 8.)

We conclude by noting that when the Legislature and the voters of the State of California decided that certain juveniles should be required to register as sex offenders and comply with the residency restriction in Jessica's Law, there was no additional provision allowing for jury trials in juvenile proceedings. In the absence of "constitutional constraints . . . , [a]ny meaningful response to the arguments advanced by [appellant] must come from the" Legislature or the electorate. (*People v. Smith, supra,* 110 Cal.App.4th at p. 1081.)[15]

[15] We consider appellant's challenge on this appeal to be limited to whether he is entitled, as a matter of procedural due process and equal protection, to a jury trial before he may be required to register as a sex offender and comply with the residency restriction in Jessica's Law. We do not read his arguments and express no opinion on the questions of whether the challenged sanctions as applied to juveniles are constitutionally overbroad or unreasonable or impinge on a liberty interest so fundamental as to implicate substantive due process rights under the Fourteenth Amendment. (See *Reno v. Flores* (1993) 507

DISPOSITION

The dispositional order is affirmed. The petition for writ of habeas corpus is summarily denied.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.

U.S. 292, 301-302 [the Fourteenth Amendment's "guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"]; see also *In re Taylor* (2012) 209 Cal.App.4th 210, review granted Jan. 3, 2013, S206143 [case presents the following issue for review: "Does the Jessica Law's residency restriction, when enforced as a mandatory parole condition against registered sex offenders paroled to San Diego County, constitute an unreasonable statutory parole condition that infringes on their constitutional rights? (See *In re E.J.* (2010) 47 Cal.4th 1258, 1282, fn. 10.)"].) In light of our determination, we do not address the parties' other contentions.

POLLAK, J., Concurring.

I agree in all respects with the lead opinion. I write simply to amplify footnote 15, to point out that the court also has not considered whether the imposition of a lifetime registration requirement, with the potential consequence of prohibiting the person from ever living within 2000 feet of a school or park, on a person whose offense was committed as a minor, constitutes cruel and unusual punishment in violation of the federal or state constitutions. (Cf. *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455]; *Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011]; *People v. Caballero* (2012) 55 Cal.4th 262.)

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Pollak, J.